

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: December 11, 1987
CASE NOS. 87-INA-570, 87-INA-571

IN THE MATTERS OF

INTEL CORPORATION,
Employer

on behalf of

ALLEN WALDOCK AND JIM-WEN YU,
Aliens

Daniel Blume, Esq.
San Francisco, CA
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Associate Chief Judge, and Brenner, DeGregorio, Fath,
Levin and Tureck, Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

These proceedings were initiated by the above-named Employer, who requested review pursuant to 20 C.F.R. §656.26 from the determinations of a Certifying Officer of the U.S. Department of Labor denying two applications for labor certification. The Employer submitted these applications on behalf of the above-named Aliens, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures whereby such immigrant labor certifications may be applied for, and granted or denied, are set forth in 20 C.F.R. Part 656. An employer who desires to employ an

alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of both labor certifications is based on the records upon which the denials were made, together with the requests for review, as contained in both Appeal Files ("AF-I" and "AF-II"),¹ and any written arguments of the parties. See 20 C.F.R. §656.27(c). Due to the similarity of these cases, both legally and factually, they have been consolidated for decision.

Statement of the Cases

On November 19, 1986 (AF-I 84-88) and December 8, 1986 (AF-II 82-85), the Employer filed its applications for alien employment certification to enable Alien Waldock to fill the position of Senior Software Engineer and Alien Yu to fill the position of Software Systems Engineer.

Following the issuance of the Notices of Findings ("NOF") by the Certifying Officer on April 21, 1987 (AF-I 60-63; AF-II 54-57), and the Employer's filing of both rebuttals on May 20, 1987 (AF-I 50-56; AF-II 45-50), the Final Determinations denying certification were issued on May 27, 1987 (AF-I 39-41; AF-II 39-41).

Discussion

Employer operates an international semiconductor manufacturing firm employing over 16,000 workers. When conducting its recruitment for the positions noted above Employer, in addition to its other usual recruitment practices (see, e.g., AF-I 1-2, 73-74), advertised both positions in the professional publication Electronic News in accordance with the State Job Service Office's recommendation (AF-I 80; AF-II 78). In both NOFs, the Certifying Officer, citing §656.24(b)(2) of the regulations, stated that:

To assure a true test of the availability of able, willing, and qualified U.S. workers, additional recruitment effort is deemed necessary. The employer should advertise this position in the following professional journal: Computer World [sic]

(AF-I 63; AF-II 55). No explanation was provided of why additional recruitment in that specific publication was "deemed necessary."

¹ "AF-I" will be used to refer to the Appeal File in the case of Alan Waldock, 87-INA-570.

"AF-II" will be used to refer to the Appeal File in the case of Jim-Wen Yu, 87-INA-571.

In response to the NOFs, Employer contended that its advertisements in Electronic News provided a true test of the availability of U.S. workers. Employer argued that Electronic News has a nationwide circulation in the professional electronics field, and its use was recommended by the State Job Service. Although agreeing to use Computerworld in its future recruitment, employer refused to comply with the Certifying Officer's instruction to readvertise in Computerworld in connection with the positions at issue in these cases.

The Final Determinations denied certification on the ground that Employer failed to readvertise in Computerworld. The Certifying Officer acknowledged that her predecessor accepted ads in Electronic News, but stated that she was not bound to follow that precedent. On appeal, the Employer contends that it was arbitrary and capricious for the Certifying Officer to base her denial on the ground that an inadequate test of the market was made by the Electronic News advertisements, especially considering all of the other recruitment activities it undertakes.

Under the regulations, Employer is required to place an advertisement in an appropriate publication such as a trade journal as a means of making an adequate test of the availability of U.S. workers [see 20 CFR §656.21(g)]. Employer complied with this section by placing advertisements in the Electronic News. Employer contends that this journal is the leading computer industry publication. Irrespective of this fact, the Certifying Officer is authorized to require further recruitment if he or she finds that such recruitment could produce additional qualified job applicants. See 20 C.F.R. §656.24(b)(2)(i) and (iii).

Nevertheless, the Certifying Officer does not have unbridled authority. To avoid the appearance of acting arbitrarily, the Certifying Officer should have explained why the publication used by Employer failed to provide an adequate test of the market, and why advertising in Computerworld would significantly add to that test. This is especially important in these cases, since Electronic News had been recommended by the State, and the current Certifying Officer's predecessor had not challenged employers' prior recruitment through that publication. Moreover, there is no indication in the record that the circulation and audience of Computerworld is different from Electronic News or otherwise better suited to the positions offered. But the Certifying Officer failed to offer any such explanation, and her reasoning is not obvious on its face.

In our view, in cases where an employer has complied with the stated regulatory criteria governing the advertisement and recruitment of employees, the Certifying Officer should not require additional advertising or recruiting without offering a reasonable explanation of why the employer's advertisements and/or recruitment were inadequate and how the additional recruitment efforts recommended by the Certifying Officer would be appropriate. In these cases, for example, evidence that Computerworld is read by a different category of prospective employees or has a higher rate of job placement success than Electronic News would be the type of evidence (although certainly not the only evidence) the Certifying Officer could rely upon in finding that advertising in only one trade journal, Electronic News, was insufficient.

In order to afford the Certifying Officer the opportunity to explain her reasons for insisting upon Computerworld as a better test of the U.S. market, we vacate her denial of certification and remand these cases to her for further consideration.

ORDER

The Certifying Officer's denials of certification are vacated, and these cases are remanded for further consideration.

JEFFREY TURECK
Administrative Law Judge

JT/DN/jb